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FEDERAL COMMUNICATIONS COMMISSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Advanced Television Systems and) MM Docket No. 87-268
Their Impact Upon the Existing)
Television Broadcast Service)

To: The Commission

COMMENTS OF HOME BOX OFFICE

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November 20, 1995

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SUMMARY

Since the beginning of its proceeding on Advanced Television Systems ("ATV") in 1987, the Commission has stressed that the migration of the U.S. television service from analog NTSC to digital high definition television ("HDTV") would bring tremendous benefits to our country. Consumers would enjoy vastly improved television picture quality and sound resonance, the U.S. consumer electronics industry would obtain a substantial lift in new product development and sales, and the nation's competitiveness in the global marketplace would be enriched. These objectives remain just as valid today.

Home Box Office, a Division of Time Warner Entertainment Company, L.P. ("HBO") is concerned that the Commission's Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry ("NPRM") on ATV suggests a lessening of the Commission's resolve to implement HDTV in the United States in a timely manner. The Commission now is proposing that terrestrial broadcasters be given flexibility to use their second allotted channel, originally intended for HDTV, for other digital services, including multi-channel Standard Definition Television ("SDTV"), which offer only marginal improvements in television technical quality.

HBO submits that the public interest objectives for HDTV originally articulated by the Commission will be compromised by this new approach. Moreover, the original public interest justification for providing incumbent broadcasters with a second

channel allotment, without competitive challenge, falls away if broadcasters are to be relieved of their obligation to lead the migration of the nation's television system to digital HDTV. If the second channel may now be used for multiple digital channels and other digital services, rather than HDTV, the most that broadcasters are entitled to, without a competitive process, is a single digital channel to replace the single NTSC channel they are surrendering.

HBO submits that the Commission should abandon the course it is now considering and stick to its original determination to transition the U.S. television system to HDTV as quickly as possible, with broadcasters leading the way. If the Commission nevertheless provides some flexibility in the use of the second channel, it should establish strict requirements for certain levels of HDTV transmission. Otherwise, the migration to HDTV will be delayed indefinitely or abandoned completely.

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COMMENTS OF HOME BOX OFFICE

I. INTRODUCTION

1 Advanced Television Systems and Their Impact Upon the
Existing Television Broadcast Service, MM Docket No. 87-268,
FCC 95-315 (released August 9, 1995) ("Notice" or "NPRM").

Commission has recognized that rapid advances in technology during the long incubation period of High Definition Television ("HDTV") require the Commission to revisit, and perhaps to revamp, certain of its previous decisions concerning ATV. In response to the changes and in its zeal to "encourage the provision of new technologies and services to the public,"² however, the Commission should not lose sight of what has long been its fundamental goal -- to foster the development and deployment of HDTV -- which will result in extraordinary improvement in free, over-the-air broadcasting and other television distribution systems used by consumers.

HBO, as the owner of the HBO and Cinemax programming services, is a leading supplier of premium video entertainment. The HBO service currently has more than 19.2 million subscribers, while more than 7.8 million consumers subscribe to Cinemax. The HBO and Cinemax services are distributed to subscribers via cable television systems, satellite master antenna systems, wireless cable systems, direct broadcast satellites, medium-power Ku-band fixed satellites and C-band satellites.

As a programming service which uses a variety of distribution outlets, HBO is particularly interested in the galvanizing effect the rapid deployment of HDTV by broadcasters would have on the progress toward digital video for all video distribution media. The quality of HBO's product, much of which consists of theatrical

² NPRM at 5.

motion pictures, has the potential to improve vastly as the quality of television improves, thus making HBO's services more attractive to subscribers.

Because of its interest in improving the quality of all U.S. television distribution systems, HBO supported the Commission's efforts to transition the broadcast television industry from analog NTSC to digital HDTV. Throughout its ATV proceeding, the Commission consistently has recognized the enormous benefits, including tremendously enhanced picture clarity and sound resonance, that the introduction of HDTV would bring to the American public. Moreover, the Commission correctly recognized that broadcasters, with their universal access to viewers and years of expertise, would best lead the HDTV charge. These observations and objectives have not lost their validity.

HBO now is concerned, however, that the direction the Commission has articulated in the NPRM evidences a substantial departure from the Commission's fundamental goal of vastly improving the quality of the U.S. television system. Instead of pursuing HDTV, with its major technical improvements, the Commission now is advancing a digital broadcasting service that will offer consumers only marginal benefits. If the Commission backs away from the strong public interest factors inherent in a rapid transition from analog NTSC television to digital HDTV, the underpinnings of its decision to grant incumbent broadcasters preferential access to additional spectrum will dissipate -- and, more importantly, the opportunity to achieve significant

enhancements in the quality of television service in the United States will be delayed or lost forever.

II. THE COMMISSION'S COMMITMENT TO HDTV IS WELL FOUNDED

The Commission long has maintained a commitment to the development and deployment of HDTV for a myriad of reasons. Most importantly, HDTV is, perhaps, the primary means through which the Commission can preserve a free, universal broadcasting service. HDTV promises consumers a high quality television picture approaching that of thirty-five millimeter film, and an audio quality equal to that of a compact disc.³ The current NTSC television system, which has served the American public for fifty years, is limited technologically and suffers from deficiencies in audio and video quality. The enormous technical improvements flowing from HDTV, including a television picture with twice the resolution, vibrant color and sound resonance, are something the Commission has worked to bring consumers since the inception of this proceeding in 1987.⁴

Second, inherent in the birth of the ATV proceeding was the idea that HDTV is capable of providing "the recovery of our faith

³ Former FCC Chairman Alfred C. Sikes likened the improvements HDTV would bring to the marketplace to the transition from records to compact discs, an improvement that consumers readily embraced. Remarks of Alfred C. Sikes before the MSTV Sixth Annual HDTV Update Conference, ANA Westin Hotel, Washington, DC (October 1, 1992).

⁴ In re Advanced Television Systems and Their Impact on the Existing Broadcast Service, 2 FCC Rcd 5125 (1987).

in the nation's capacity to discover and invent."⁵ Similarly, the Commission acted on instructions from Congress indicating that HDTV could assist major segments of the country's electronics industry, generating \$50 to \$250 billion in communications expansion, and increasing the United States' ability to compete in the new global marketplace.⁶ According to Congress, "HDTV is indeed becoming the paradigm of American competitiveness and a test of the country's ability to survive under rival pressure."⁷ The Commission's actions consistently have been colored by the paramount goal of ensuring the role of the United States in producing HDTV technology.

Because of its desire to bring this new and desirable service to consumers as quickly as possible, the Commission decided to limit initial license eligibility for HDTV to existing broadcasters.⁸ The Commission recognized that existing broadcasters had invested heavily in the current NTSC system and possessed the knowledge and experience to implement HDTV swiftly

⁵ Ervin S. Duggan, Remarks of Commissioner Ervin S. Duggan Before the HDTV World Conference, Las Vegas, Nevada (April 15, 1991).

⁶ S. Rep. No. 952, 101st Cong., 1st Sess. (1989); H.R. Rep. No. 1267, 101st Cong., 1st Sess. (1989).

⁷ Id.

⁸ In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, FCC 92-438 (October 16, 1992) (Third Report and Order) at ¶¶ 6, 8.

and efficiently.⁹ According to the Commission, the continued involvement of existing broadcasters in HDTV was the "most practical, expeditious, and non-disruptive way to bring improved service to the American public."¹⁰

HBO firmly believes that the Commission's determination that existing broadcasters are the ones most likely to spur the transition from NTSC to much improved HDTV still holds true. Broadcasters by far have the largest audience of television viewers, and the exposure of these broadcast television viewers to the overwhelming quality enhancements of HDTV will encourage manufacturers to make, and consumers to invest in, HDTV reception equipment. This investment, on a large scale basis over a period of time, is what is necessary to achieve the conversion of the U.S. television system from NTSC to digital HDTV. Moreover, if broadcasters are encouraged to lead the HDTV conversion effort, other programmers, such as HBO, will follow quickly in response to the competitive marketplace.¹¹ Thus, by staying the course and

⁹ In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, 7 FCC Rcd 3340 (1992) (Second Report and Order) at ¶ 11.

¹⁰ Id.

¹¹ Creating the environment for manufacturers to produce HDTV receivers in volume is critical to the success of HDTV, because volume pricing of receivers is necessary to achieve deep penetration of the consumer market. While HBO would be pleased if it and other cable programming services could create this environment through the strength of their programming, in fact, it is the broadcast industry, with its access to almost every viewer in the country, that must be at the forefront of this effort.

requiring broadcasters to embrace HDTV, the Commission can ensure the success of its original and still sound objective of fostering an efficient conversion of our nation's television system from mediocrity to superiority.

III. THE COMMISSION SHOULD REQUIRE BROADCASTERS TO USE THE SECOND CHANNEL FOR HDTV

In a marked departure from the advancement of its well-founded policy goals, the Commission's NPRM poses alternative uses for the spectrum currently allocated for HDTV, including the possibility of providing broadcasters with complete flexibility to use, or not to use, the additional spectrum for HDTV. The "rethinking" evidenced in the Commission's NPRM has been spurred by technological advances which have occurred since the initiation of the HDTV effort in 1987 and which clearly have complicated the scenario for transition to HDTV. The current state of digital compression technology will permit the transmission of multiple channels of Standard Definition Television ("SDTV") programming within the 6 MHz channel allotted for HDTV. The quality of the SDTV service would be comparable to, and "possibly" better than, the current NTSC channels,¹² but it would not come close to the quality that could be obtained from true HDTV.

Some broadcasters, driven by the promise of the revenues which they perceive could be generated from multiple program channels, including subscription channels, are attempting to shed

¹² NPRM at 4.

the mantle the Commission placed upon them as leaders of the HDTV revolution.¹³ They, therefore, support broad flexibility to determine how to use their second channel.

HBO submits that the legal and policy principles that justified awarding broadcasters a second channel without a comparative process or other competitive allocation mechanism do not permit broadcasters to obtain the flexibility they now seek. If HDTV is to be abandoned or relegated to a second-tier objective, then the second channel allocation decision, including the preference incumbent broadcasters received, must be revisited. To avoid this result, HBO submits that the Commission should simply affirm that the second channel allocated to broadcasters must be used for the provision of HDTV.

A. Departure from the HDTV Commitment Would Undermine the Public Interest

Opening the channels currently allocated for digital HDTV to other uses would constitute an abandonment of the policy goals Congress, the Commission and the television industry have worked hard to achieve and could deprive consumers of the opportunity to experience dramatic improvements in free, over-the-air broadcasts. Given flexibility, broadcasters could incorporate any number of

¹³ This desire to divert spectrum intended for HDTV to other digital services apparently is not shared by all broadcasters. Some broadcasters have signalled their intent to begin HDTV service at an early date, and the Board of the Association for Maximum Service Television has adopted a resolution pledging its members to use their second channel primarily for HDTV. "Broadcasters come together over HDTV," Broadcasting & Cable, April 17, 1995 at 6.

programming permutations on their second channels, mixing HDTV with SDTV and subscription services with non-subscription services, airing only HDTV broadcasts, or foregoing HDTV altogether. In essence, then, by granting broadcasters flexibility, the Commission would be opening the door to chaos.

The future of free, universal, over-the-air television relies on standardization. It is standardization that has made current over-the-air television virtually ubiquitous. Without some standardization in the transition of broadcast television to digital HDTV, manufacturers will not have the incentive to create and improve HDTV equipment and produce it in the volumes necessary to bring down prices. Volume production of HDTV receivers will occur only if manufacturers are convinced that broadcasters have a unified plan to convert to HDTV within a reasonable time. If consumers are presented with a variety of digital formats in each television market, some of which may not include HDTV at all, confusion will permeate the transition process and consumers may never have the opportunity to access and embrace the extraordinary improvements in television inherent in HDTV. Simply put, the public interest considerations that justified an uncontested allocation of a second channel to every incumbent broadcaster fall away if the flexibility proposed in the NPRM is granted.

B. Allocation of a Second Channel to Broadcasters Without an HDTV Requirement Cannot Withstand Legal Scrutiny

A decision by the Commission to grant incumbent broadcasters flexibility in the use of the second channel, originally allocated

for HDTV, as now proposed in the NPRM, raises significant legal questions under the Commission's spectrum allocation policies and the principles of Section 309 of the Communications Act, 47 U.S.C. § 309, and Ashbacker Radio Corp. v. FCC.¹⁴ In Ashbacker, the United States Supreme Court held that "where two bona fide applications are mutually exclusive, the grant of one without a hearing to both deprives the loser of the opportunity for a hearing to which he is entitled under Section 309."¹⁵ The Ashbacker doctrine guarantees licensed broadcasters and potential new applicants equal opportunity with respect to seeking licenses for new broadcast spectrum. The Commission can promulgate rules limiting eligibility to apply for newly allotted channels only when such action provides an overriding public interest benefit.¹⁶

In allocating the second broadcast channels for HDTV, the Commission recognized that HDTV represented a major advance in television technology, not the start of a new and separate

¹⁴ 326 U.S. 327 (1945).

¹⁵ Id.

¹⁶ See Notice of Proposed Rulemaking in PR Docket 93-144, 8 FCC Rcd 3950, 3955 (1993); Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735, 4738-39 (1993). The Commission has stated that Ashbacker is not triggered where the proposed channels are not otherwise available for application by other parties but for the incumbent licensee's willingness to move from its present channel. See Intraband Television Channel Exchanges, 59 RR 2d 1455 (1986) (permitting exchanges between commercial and noncommercial licensees in the same band). In the instant situation, this logic does not apply, and the "second channels" must be considered "open" channels subject to the Ashbacker doctrine. See Rainbow Broadcasting Co. v. FCC, 69 RR 2d 1572 (D.C. Cir. 1991).

service.¹⁷ Based on that rationale, the Commission concluded that these second channels were not "open" channels subject to Ashbacker's requirements of open competition. Moreover, the Commission's current policy of providing existing broadcasters with priority over new entrants in applying for channels set aside for HDTV was justified by a strong public interest determination. Specifically, the Commission concluded that the incumbents' preference was justified based on the expertise and investments that existing broadcasters have in television service, and the belief that this large pool of experienced talent would be the best means through which to bring improved free, over-the-air HDTV television service to the public.¹⁸

By opening the second channel to uses other than HDTV (multichannel SDTV, for example), in which broadcasters have no more vested interest or expertise than potential competing applicants, the public interest rationale for granting the spectrum to these incumbents, without a competitive process, evaporates. Similarly, the idea that the second channel will be used to enhance existing television service rather than for a "new" service is compromised.¹⁹ Therefore, while the principles of Ashbacker may not preclude the Commission from providing

¹⁷ Second Report and Order at ¶¶ 7,8.

¹⁸ Id. at ¶ 6.

¹⁹ HBO disagrees with the Commission's view that it is not creating a "new" service if it permits the second channel to be used for a myriad of digital services instead of HDTV. NPRM at ¶ 28. See note 19, infra.

uncontested preferences to broadcasters for the purpose of creating significant enhancements to their existing services, Ashbacker would in fact preclude the Commission from awarding these valuable channels to broadcasters to use as they see fit.²⁰

To the extent the Commission decides that the spectrum heretofore targeted for HDTV may be used for SDTV or other services, therefore, the Commission must reexamine the presumption that incumbent broadcasters should have first call on 1,691 new 6 MHz channels.²¹ As stated above, the Commission's current policy is based on the presumption that making a second channel available to broadcasters serves the public interest by permitting

²⁰ In its Notice, the Commission attempts to justify any potential decision to grant broadcasters flexibility in the use of this spectrum on the basis that its licensing scheme constitutes a "one-for-one swap" of spectrum. The fact remains, however, that in order to reduce any potential adverse impact on consumers, broadcasters will be permitted use of the additional spectrum for at least fifteen years before any "swap" takes place. The Commission's justification on this basis, therefore, is tenuous at best.

Similarly, the Commission posits that Ashbacker is not triggered because the Commission simply is defining a category of eligible applicants rather than rejecting one bona fide applicant without comparing it to the others. This rationale may suffice where there is a strong public interest in creating the category of eligible applicants. Should the second channel be opened for uses other than HDTV, however, the Commission could not sustain such a public interest requirement.

²¹ Certainly, any decision to afford broadcasters total flexibility in the use of the second channel raises the question of whether the Commission should extract payment from the licensees, particularly given Congress' penchant for auctions. Should Congress authorize the Commission to auction the spectrum currently allocated for HDTV channels, it is estimated to garner between \$14 and \$70 billion in revenues. Multichannel News, September 11, 1995 at 1.

incumbents to continue current NTSC service on the first channel while allowing the transition to higher quality advanced television on the second channel. Complete flexibility, including the possible elimination of HDTV service in favor of SDTV and its potential revenues, presents no such public interest justification. Instead, the spectrum currently allocated to bring consumers HDTV would merely be used to provide yet another multichannel video service, a type of service which currently exists in abundance.²²

If the Commission concludes that the second 6 MHz channel may be used for SDTV, the only legitimate claim broadcasters could make for an uncontested preference would be to exchange their current 6 MHz analog channel for a single digital channel on an SDTV system. This could, legitimately, under Ashbacker principles, be viewed as a channel for channel exchange to achieve some improvement in service quality, albeit modest. The migration from a single channel service to a multi-channel service, however, would constitute, in HBO's view, the creation of a new service subject to competitive licensing.²³

²² Multichannel distribution services include cable television, SMATV, wireless cable, C-band direct-to-home ("DTH"), Ku-band DTH, DBS and telephone company video dialtone.

²³ Assuming a four-to-one digital compression ratio which is a conservative estimate of what is achievable today, the Commission would have 5073 SDTV digital channels to award to new applicants by auction or some other selection process if broadcasters were awarded one SDTV channel in exchange for their single analog channel.

IV. SHOULD THE COMMISSION ADOPT A FLEXIBLE USE APPROACH, ITS REGULATORY SCHEME MUST INCORPORATE CERTAIN ELEMENTS TO ENSURE EVENTUAL DEVELOPMENT OF HDTV

Should the Commission determine to grant broadcasters some flexibility in the use of the second channel, HBO submits that the Commission must incorporate certain conditions on this flexibility if the Commission is to preserve any hope of bringing HDTV and its attendant improvements to the American public.

A. Broadcasters Must Be Required To Devote a Substantial Amount of Time to HDTV

If the Commission adopts a flexible approach, it should require that a substantial portion of the broadcast day be devoted to HDTV programming. Moreover, to foster the further development and acceptance of HDTV, digital HDTV broadcasts must occur during popular dayparts, including prime time, where consumers will most easily access, comprehend, and appreciate the dramatic improvement in their television service. Consumers are highly likely to warmly embrace the incredible picture quality and sound improvements that HDTV will bring. Without access to HDTV, however, they will not be able to appreciate what they do not see. Only by requiring broadcasters to present a significant amount of HDTV programming during time periods when consumers are most likely to watch can the Commission create enough demand for HDTV to warrant the large scale manufacture of digital television sets and reduction in HDTV equipment prices.²⁴

²⁴ HBO submits that even in periods where the broadcaster is not originating programming produced in the HDTV format, the HDTV
Continued on following page

B. The Commission Must Mandate That Television Sets Be Capable of Receiving All Formats

In order to preserve the potential for a full-scale transition to HDTV, the Commission must require that every ATV television set manufactured be capable of receiving all of the television formats which the Commission may authorize, including digital HDTV, SDTV, and analog NTSC. Such a policy would be consistent with the policies adopted in the All Channel Receiver Act, 47 U.S.C. 303(s), which authorized the Commission to require that all television receivers be capable of receiving all channels allocated to television broadcasting.²⁵ There, Congress and the Commission sought to increase parity between the UHF and VHF television services. While the All Channel Receiver Act adopted in 1962 did not contemplate and thus does not mandate manufacture of dual-mode (ATV and NTSC receivers), HBO submits that in order for HDTV to become a reality consumers must be able to make the transition easily and affordably, without the risk that equipment they purchase, such as a new ATV receiver, would soon be unable to receive signals from broadcasters that were still transmitting in

Continued from previous page

channel should be transmitting an HDTV signal converted from NTSC programming. In this way, viewers with an HDTV receiver will be able to see some improvement in the program technical quality even though it is not true HDTV.

²⁵ See also In re Television Broadcast Receiver Antennas, 62 FCC 2d 164 (1976).

NTSC. In the long run, such a requirement is not likely to impose burdensome costs on consumers.²⁶

V. CONCLUSION


For years, it was assumed that the second channel allotted to broadcasters in the ATV proceeding would be used for HDTV -- a result which would vastly improve the quality of the broadcast television service in the United States. Advances in digital compression technology, however, now have enabled broadcasters to compress more channels into the 6 MHz originally allotted for HDTV. If this approach is pursued, broadcasters will, in all likelihood, relegate HDTV to secondary status, if not write it off altogether. The entry into SDTV is a prescription for indefinite postponement of a significant advance in television that was once given high government priority and was, in fact, one of the fundamental underpinnings of the Commission's channel allocation policies. HBO believes that the Commission must reaffirm that priority and establish rules and policies that will foster the development and deployment of HDTV as originally intended. Otherwise, the legal and policy principles that justified the allocation of additional spectrum to broadcasters, without a

²⁶ At some point during the transition period, the Commission may wish to address the need to require manufacturers to cease supplying NTSC-only receivers. While such a course should not be necessary in the early years of the transition, at some point, when ATV receiver prices decline, it will be counterproductive to continue to seed the consumer electronics market with NTSC-only receivers.

competitive process, will disappear, and the Commission will be compelled to permit new entrants to compete for the new multichannel digital service now being proposed.

Respectfully submitted,

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